No. 17-647

In the Supreme Court of the United States

ROSE MARY KNICK, PETITIONER

v.

TOWNSHIP OF SCOTT, PENNSYLVANIA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF VACATUR AND REMAND

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JEFFREY H. WOOD
CHAD A. READLER
Acting Assistant Attorneys General
JEFFREY B. WALL
Principal Deputy Solicitor General
ERIC GRANT
HASHIM M. MOOPPAN
Deputy Assistant Attorneys General
BRIAN H. FLETCHER
Assistant to the Solicitor General
WILLIAM B. LAZARUS
BRIAN C. TOTH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), properly bars a property owner from filing an action in federal district court seeking just compensation for an asserted taking by a local government in circumstances where state law provides an adequate mechanism for obtaining just compensation in state court.

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INTEREST OF THE UNITED STATES

This case concerns the procedures available to property owners seeking to recover just compensation for Fifth Amendment takings by local governments. Those procedures do not apply to suits seeking to recover for asserted takings by the United States, which may be brought only under the Tucker Act, 28 U.S.C. 1491, or another statute waiving sovereign immunity. But the United States has a substantial interest in the sound development of the relevant Fifth Amendment principles.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are set forth in the appendix to this brief. App, *infra*, 1a-4a.

STATEMENT

A. The *Williamson County* Rule

1. The plaintiff in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985) (*Williamson County*), owned land in Tennessee that it wanted to develop into a residential subdivision. *Id.* at 175. After the local planning commission refused to approve the development, the plaintiff sued in federal court, alleging that the applicable zoning laws amounted to a Fifth Amendment taking. *Id.* at 176-182. It invoked 42 U.S.C. 1983, which provides a cause of action to a party subjected to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States by a person acting under color of state law. *Williamson County*, 473 U.S. at 182.

This Court concluded that the Section 1983 action was "not yet ripe" because the plaintiff had not pursued state procedures for obtaining just compensation. *Williamson County*, 473 U.S. at 194.[1] The Court explained that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking." *Ibid.* Instead, "all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (quoting *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)).

Applying that principle in *Williamson County*, the Court observed that Tennessee law appeared to allow the plaintiff to "bring an inverse condemnation action

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[1] The Court separately held that the claim was premature because the plaintiff had "not yet obtained a final decision regarding how it w[ould] be allowed to develop its property." *Williamson County*, 473 U.S. at 190. That holding is not at issue here. Pet. App. A20-A21.

to obtain just compensation for [the] alleged taking." 473 U.S. at 196. The Court noted that the plaintiff "ha[d] not shown that the inverse condemnation procedure [wa]s unavailable or inadequate." *Id.* at 196-197. And the Court held that "until [the plaintiff] ha[d] utilized that procedure, its taking claim [wa]s premature." *Id.* at 197.

In a footnote, the Court explained its holding in terms that reflected its understanding that the cause of action in Section 1983 is available only to redress constitutional *violations*: "[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a [Section] 1983 action." *Williamson County*, 473 U.S. at 194 n.13 (emphasis omitted).

2. In describing the claim at issue as "premature" and "not yet ripe," *Williamson County* appeared to assume that an owner required to pursue a state compensation mechanism would be able to seek relief in federal court if the state-court procedure was adequate but the owner was dissatisfied with the result. That assumption has proved incorrect. Under 28 U.S.C. 1738, state-court judgments in inverse-condemnation actions have claim- and issue-preclusive effect. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 336 (2005) (*San Remo*). Accordingly, a property owner who unsuccessfully seeks compensation in state court is generally barred from bringing a subsequent action in federal court. *Id.* at 346-348. Because of that result, critics of the *Williamson County* rule, including several Members of this Court, have stated that it "all but guarantees that claimants will be unable to utilize the federal

courts to enforce the Fifth Amendment's just compensation guarantee" against local governments. *Id.* at 351 (Rehnquist, C.J., concurring in judgment); see *Arrigoni Enters.* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (*Arrigoni*) (Thomas, J., dissenting from denial of certiorari); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envtl. Prot.*, 560 U.S. 702, 742 (2010) (Kennedy, J., concurring in part and concurring in judgment).[2]

B. The Present Controversy

In 2012, respondent the Township of Scott enacted an ordinance regulating cemeteries, which the ordinance defines to include any area that has been used as a burial place. Pet. App. A2. The ordinance provides that an owner whose property contains a cemetery must allow public access to the cemetery during daylight hours. *Ibid.* It also provides that respondent's agents may enter any property in the Township to enforce the ordinance. *Id.* at A4.

Petitioner owns land in the Township. Pet. App. B2. Respondent has determined that her property contains a cemetery, and petitioner no longer contests that determination. *Id.* at A4; see Pet. Br. 6 n.2. In 2013, respondent issued two notices advising petitioner that she was violating the ordinance's public-access requirement. Pet. App. A4-A5.

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[2] The effect of the *Williamson County* rule is limited to claims against local governments. "[T]he State and arms of the State * * * have traditionally enjoyed Eleventh Amendment immunity," and Section 1983 does not abrogate that immunity because States as such "are not subject to suit under [Section] 1983" at all. *Howlett* v. *Rose*, 496 U.S. 356, 365 (1990). Suits for injunctive relief against state officers may, however, be brought under Section 1983. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989).

In 2014, petitioner filed this Section 1983 suit in federal district court. Pet. App. B4. As relevant here, she alleged that the ordinance results in a taking because it creates easements allowing access to her property. *Id.* at B4-B6. The court dismissed petitioner's Fifth Amendment claim without prejudice, relying on *Williamson County*. *Id.* at B1-B18.

The court of appeals affirmed. Pet. App. A1-A33. It held that, under *Williamson County*, a property owner bringing a federal suit to recover for an asserted taking by a local government must first "seek and be denied just compensation using the state's procedures, provided those procedures are adequate." *Id.* at A20-A21. The court explained that Pennsylvania law allows a property owner to bring an inverse-condemnation action to obtain compensation for a Fifth Amendment taking. *Id.* at A5. The court noted that petitioner had neither availed herself of that procedure nor shown that it is inadequate. *Id.* at A21. The court therefore affirmed the dismissal of her Fifth Amendment claim "pending exhaustion of state-law compensation remedies." *Id.* at A32.

SUMMARY OF ARGUMENT

Owners whose property is taken by a local government have a Fifth Amendment right to receive just compensation. Like other plaintiffs asserting constitutional claims against local governments, those owners should be able to vindicate their federal rights by bringing actions in federal court. This Court should clarify or overrule *Williamson County* to make clear that they may do so.

I. *Williamson County* began by recognizing that the Fifth Amendment does not require compensation to be paid in advance of, or contemporaneously with, a tak-

ing. That recognition broke no new ground—to the contrary, this Court had already held for nearly a century that the government may take property without paying compensation in advance if it has provided the owner with a reasonable, certain, and adequate mechanism for obtaining just compensation. Congress and the Executive Branch have relied on that principle, and petitioner does not challenge it here.

II. That settled Fifth Amendment principle does not, however, bar an owner whose property is taken by a local government from seeking just compensation in a federal forum. The owner's ability to do so depends not on the meaning of the Takings Clause, but instead on a statutory question: whether she has a cause of action to enforce her Fifth Amendment rights that is within the jurisdiction of the federal courts.

Williamson County answered that question by assuming without explanation that an owner whose property is taken by a local government lacks a cause of action under 42 U.S.C. 1983 unless the government violated the Fifth Amendment. Lower courts have extended *Williamson County* more broadly, treating it as a ripeness rule that bars federal courts from entertaining *any* cause of action seeking compensation for a taking by a local government until after the owner has sought compensation in state court.

That rule creates an unfortunate Catch-22: Until an owner is denied compensation in state court, she cannot bring a federal action because her claim is not "ripe." But as soon as a state court denies compensation, her federal claim is barred because the state judgment precludes further litigation. *Williamson County* thus effectively closes the federal courts to local takings claimants. That is a serious and unjustified anomaly, and this Court

should eliminate it by making clear that those claimants may vindicate their Fifth Amendment rights in federal court. The Court could accomplish that result in either of two ways.

First, the Court could clarify that *Williamson County* leaves takings claimants with a viable path to federal court. It applies only to Section 1983 suits and poses no obstacle if an owner invokes a different cause of action. And if the *Williamson County* rule bars a Section 1983 action, it is *because* the owner has such a cause of action available—usually, an inverse-condemnation action like the one available to petitioner under Pennsylvania law. That cause of action is, of course, a creature of state law. But "even though state law creates a party's cause of action," her claim may still be within the jurisdiction of the federal district courts under 28 U.S.C. 1331 where, as here, "a well-pleaded complaint establishe[s] that [her] right to relief under state law requires resolution of a substantial question of federal law." *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997) (*International College*) (brackets and citation omitted).

Second, this Court could reconsider and reject *Williamson County*'s assumption about Section 1983. As several Members of the Court have recognized, the anomalies and confusion spawned by *Williamson County* provide ample justification for reconsideration. So does the fact that *Williamson County* relied on an unexplained assumption about the cause of action available under Section 1983 rather than a full statutory analysis. And a fresh examination of Section 1983's text, history, and practical operation—in combination with the unique nature of the Takings Clause—indicate that *Williamson County* was mistaken. Because the Fifth Amendment

gives an owner whose property is taken a right to just compensation, she is properly regarded as having been "depriv[ed] of a[] right[] * * * secured by the Constitution" within the meaning of Section 1983 if she has not yet received that compensation. That remains true even where the presence of an adequate state compensation mechanism means that the local government has not violated the Fifth Amendment.

ARGUMENT

I. THE FAILURE TO PROVIDE CONTEMPORANEOUS COMPENSATION FOR A TAKING DOES NOT VIOLATE THE FIFTH AMENDMENT IF THE GOVERNMENT HAS PROVIDED AN ADEQUATE MECHANISM FOR OBTAINING JUST COMPENSATION

Williamson County recognized that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, [a] taking." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Instead, "all that is required" for a lawful taking of property for public use "is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (citation omitted). Petitioner does not challenge that fundamental Fifth Amendment principle, which is reflected in nearly 130 years of this Court's precedents.

A. This Court Has Long Held That The Fifth Amendment Does Not Require That Compensation Be Paid Before Or At The Same Time As A Taking

The Takings Clause, made applicable to the States and their political subdivisions by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V; see *Penn Cent. Transp. Co.* v. *City of*

New York, 438 U.S. 104, 122 (1978). "As its text makes plain," the Clause "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (citation omitted). "In other words, it 'is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.'" *Id.* at 536-537 (citation omitted). The Fifth Amendment's text is silent on *when* the required compensation must be paid. This Court, however, has long held that the government may provide the owner with an adequate mechanism for obtaining compensation after a taking.

1. This Court first considered the issue in *Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U.S. 641 (1890). That case involved a federal statute authorizing a railroad to condemn land belonging to the Cherokee Nation. *Id.* at 642-648. The Nation argued that the statute violated the Fifth Amendment because it did not "provide for compensation to be made to [the Nation] before the [railroad] entered upon [its] lands." *Id.* at 658. The Court disagreed, emphasizing that the Takings Clause "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken." *Id.* at 659. Instead, the Court held that "the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed." *Ibid.*

In the decades after *Cherokee Nation*, this Court repeatedly reaffirmed that the Takings Clause does not require "that compensation should be made previous to the taking" so long as "adequate means [are] provided for a reasonably just and prompt ascertainment and

payment of the compensation." *Crozier* v. *Fried. Krupp A.G.*, 224 U.S. 290, 306 (1912); see, *e.g.*, *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932); *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 677 (1923); *Albert Hanson Lumber Co.* v. *United States*, 261 U.S. 581, 587 (1923); *Hays* v. *Port of Seattle*, 251 U.S. 233, 238 (1920); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919); *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 196 U.S. 239, 251-252 (1905); *Williams* v. *Parker*, 188 U.S. 491, 502 (1903); *Backus* v. *Fort St. Union Depot Co.*, 169 U.S. 557, 568 (1898); *Sweet* v. *Rechel*, 159 U.S. 380, 400-402 (1895). More than a century ago, the Court described that rule as "[i]ndisputabl[e]," *Crozier*, 224 U.S. at 306, and "settled by repeated decisions," *Williams*, 188 U.S. at 502.

2. This Court's decisions also defined what qualifies as a "reasonable, certain and adequate" provision for compensation. In *Cherokee Nation*, the Court upheld a procedure barring the railroad from entering the land to be condemned until it had deposited with a court double the land's value as determined by independent referees. 135 U.S. at 659. Such security may be necessary when the eminent domain power is delegated to private corporations, which may prove "insolven[t]" or otherwise unable to pay compensation ultimately awarded by a court. Philip Nichols, *The Power of Eminent Domain* § 265, at 309 (1909) (Nichols). But similar measures are not required when the "the public faith and credit are pledged to a reasonably prompt ascertainment and payment" and "there is adequate provision for enforcing the pledge." *Joslin Mfg.*, 262 U.S. at 677; see Nichols § 264, at 307-308. The Court thus repeatedly approved

statutes providing compensation by authorizing owners to bring suits against governmental entities. For example:

- The Court upheld two Massachusetts statutes that provided compensation for the taking of land "by giving the owners a right of action" against the city of Boston. *Williams*, 188 U.S. at 502; see *Sweet*, 159 U.S. at 406-407 (applying the Massachusetts Constitution).
- The Court upheld, as making "full and adequate provision for the exercise of the power of eminent domain," a statute specifying that the owner of a patent taken by the government could "recover reasonable compensation * * * by suit in the Court of Claims." *Crozier*, 224 U.S. at 302-303, 307.
- The Court held that even if a Washington statute constituted a taking, "there was adequate provision for compensation" in generally applicable statutes that "entitle[d] any person having a claim against the State to begin an action thereon" in state court. *Hays*, 251 U.S. at 238.
- The Court similarly held that even if the actions of a federal contractor effected a taking, those actions were "within the constitutional power" because a suit under the Tucker Act "afford[ed] a plain and adequate remedy" by which the owner could seek just compensation. *Yearsley*, 309 U.S. at 20-21.

3. In the decades since *Yearsley*, this Court has repeatedly confirmed that a suit under the Tucker Act provides a constitutionally sufficient mechanism for obtaining just compensation for takings by the federal

government. The Tucker Act waives sovereign immunity and grants the Court of Federal Claims jurisdiction over claims seeking compensation for asserted takings by the United States. 28 U.S.C. 1491(a); see 28 U.S.C. 1346(a)(2) (concurrent district-court jurisdiction over claims seeking $10,000 or less). That generally applicable mechanism ensures that federal actions are not rendered invalid or subject to injunctions merely because they may effect a taking.

Thus, for example, the Court rejected a Fifth Amendment challenge to the Regional Rail Reorganization Act of 1973 because the Tucker Act would supply a "reasonable, certain and adequate provision for obtaining compensation" if the statute effected a taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-125 (1974) (citation omitted); see *id.* at 125-136. The Court has applied the same logic to many other federal statutes. See, *e.g.*, *Preseault* v. *ICC*, 494 U.S. 1, 11-17 (1990) (National Trails System Act Amendments of 1983); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (Clean Water Act); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1019 (1984) (Federal Insecticide, Fungicide, and Rondenticide Act); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 & n.40 (1981) (Surface Mining Control and Reclamation Act); *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 94 n.39 (1978) (Price-Anderson Act); see also *Dames & Moore* v. *Regan*, 453 U.S. 654, 688-689 (1981) (Executive Order). Each of those decisions rested on the premise, reaffirmed in *Williamson County*, that "the availability of a suit for compensation against the sovereign will defeat

a contention that the action is unconstitutional as a violation of the Fifth Amendment." *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949).

B. This Court's Longstanding Interpretation Is Consistent With The Text Of The Takings Clause And With Historical Evidence

This Court's longstanding interpretation of the Takings Clause is consistent with the Clause's text, with available evidence of contemporaneous understanding, and with early decisions interpreting parallel state constitutional provisions.

1. As this Court recognized in *Cherokee Nation*, the text of the Fifth Amendment "does not provide or require that compensation shall be actually paid in advance." 135 U.S. at 659. Nor could such a requirement be implied from the use of the term "just compensation." To the contrary, "compensation" naturally includes a payment made after the event being compensated.[3] A property owner who receives a post-taking award—which must include an adjustment for the delay in payment, see *Jacobs* v. *United States*, 290 U.S. 13, 17 (1933)—thus receives the "just compensation" the Fifth Amendment requires for a lawful taking.

That understanding is reinforced by the marked contrast between the Fifth Amendment and later state provisions expressly specifying that property could not be taken—or, in some cases, could not be taken by non-

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[3] See 1 Samuel Johnson, *A Dictionary of the English Language* (2d ed. 1755) ("Recompen[s]e; [s]omething equivalent; amends."); 1 Noah Webster, *An American Dictionary of the English Language* 344 (1841) ("That which supplies the place of something else, or makes good a deficiency.").

state entities—"without just compensation being *previously made*." Ky. Const. Art. 12, § 12 (1792) (emphasis added); see, *e.g.*, Ind. Const. Art. 1, § 21 (1851) ("first assessed and tendered"); La. Const. Tit. VI, Art. 109 (1845) ("previously made"); Md. Const. Art. III, § 46 (1851) ("first paid or tendered"); see also *Blanchard* v. *City of Kansas*, 16 F. 444, 444-445 (C.C.W.D. Mo. 1883) (describing these state provisions).

2. This Court's interpretation is consistent with the limited available evidence about the contemporaneous understanding of the Takings Clause. In construing the Clause, this Court has looked to St. George Tucker, "the author of the first treatise on the Constitution." *Horne* v. *Department of Agric.*, 135 S. Ct. 2419, 2426 (2015). In his view, the Clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practised during the revolutionary war, *without any compensation whatever*." 1 St. George Tucker, *Blackstone's Commentaries* App. 305-306 (1803) (emphasis added). A requirement to provide an adequate means of obtaining post-taking compensation is consistent with that goal.

Similarly, James Madison—the author of the Takings Clause—referred to the type of protection provided by the Clause as ensuring that private property shall not "be taken directly, even for public use, without *indemnification* to the owner." James Madison, *Property*, Nat'l Gazette, Mar. 27, 1792, *reprinted in* 4 *Letters and Other Writings of James Madison* 479 (R. Worthington ed. 1884) (emphasis altered). "Indemnification" naturally connotes a post-taking payment.

3. Finally, early interpretations of similar language in state constitutions indicate that the Takings Clause

does not require pre-taking compensation. Beginning in the early 1800s, state courts generally held that provisions requiring compensation for takings, without more, did not require "compensation before the actual appropriation." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 560 (1868); see *id.* at 560 n.2 (collecting cases); see also, *e.g.*, Henry E. Mills, *A Treatise on the Law of Eminent Domain* § 124, at 156-157 (1879).[4]

In 1815, for example, the Massachusetts Supreme Judicial Court upheld a statute authorizing the taking of property for a canal and providing for "proceedings to recover damages." *Stevens* v. *Proprietors of the Middlesex Canal*, 12 Mass. 466, 468 (1815). And in 1838, the Indiana Supreme Court upheld a similar statute authorizing the taking of land for a road "without previous compensation." *Rubottom* v. *M'Clure*, 4 Blackf. 505, 508 (1838). The court observed that "the laws of several other states * * * abound with instances of similar legislation," and that "the constitutionality of these laws has never been questioned." *Ibid.*

C. Congress And The Executive Branch Have Relied On This Court's Longstanding Interpretation

Congress and the Executive Branch have relied on this Court's repeated holdings "that so long as compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional."

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[4] Another treatise disagreed with that view and cited "some" decisions reaching the opposite result. 2 John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 678, at 1162 (3d ed. 1909). But the cited decisions were issued after 1845, and even then the treatise acknowledged that "in most States it is held that the making of compensation need not precede" the taking. *Id.* at 1162-1163.

Riverside Bayview Homes, 474 U.S. at 128. Because a suit under the Tucker Act is an adequate mechanism for obtaining compensation, Congress can be assured that "the possibility that the application of a regulatory program may in some instances result in [a] taking" will not invalidate the program or result in an injunction. *Ibid.* And for the same reason, Executive Branch officials may faithfully implement Congress's directives without fear that they will later be held to have violated the Fifth Amendment.

That assurance is vital because of "the nearly infinite variety of ways in which government actions or regulations can affect property interests." *Arkansas Game & Fish Comm'n* v. *United States*, 568 U.S. 23, 31 (2012). The Court has recognized that, under its modern takings doctrine, "no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ibid.* For the same reason, it would be impossible to provide compensation in advance for all federal actions that might ultimately be found to be takings. The United States therefore has a substantial interest in the reaffirmation of the nearly 130 years of precedent holding that the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, [a] taking." *Williamson County*, 473 U.S. at 194.[5]

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[5] As a matter of policy, Congress has directed that the federal government should take real property through "formal condemnation proceedings" where possible. 42 U.S.C. 4651(8); see 42 U.S.C. 4602(a). But outside the context of direct appropriations and certain physical invasions, the extent to which a given action will result in a taking is often unclear or contested.

II. THE EXISTENCE OF AN ADEQUATE STATE-LAW MECHANISM FOR OBTAINING JUST COMPENSATION FOR A TAKING BY A LOCAL GOVERNMENT DOES NOT PREVENT THE OWNER FROM VINDICATING HER FIFTH AMENDMENT RIGHTS IN FEDERAL COURT

Although *Williamson County* correctly recognized that a taking by a local government does not *violate* the Fifth Amendment if state law provides an adequate mechanism for obtaining just compensation, that constitutional principle does not bar a property owner from *enforcing* her Fifth Amendment rights by bringing an action in a federal forum. The owner's ability to do so turns not on the Takings Clause, but on a statutory question: whether she has a cause of action to obtain just compensation that is within the jurisdiction of the federal district courts.

Williamson County answered that question by assuming that an owner whose property is taken by a local government lacks a cause of action under Section 1983 unless the government violated the Fifth Amendment. But the Court did not clearly identify or analyze that statutory issue. And because the Court articulated its holding in ripeness terms, lower courts have generally treated *Williamson County* not as an interpretation of Section 1983, but instead as a ripeness rule that bars federal courts from entertaining *any* action seeking compensation for a local-government taking unless the owner first seeks compensation in state court.

That understanding has created a well-recognized Catch-22. Until a property owner is denied compensation by a state court, she cannot bring a federal action because her claim is not "ripe." But once a state court denies compensation, the owner *still* cannot bring a fed-

eral action because the state judgment precludes further litigation. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323, 344-348 (2005). The very event that ripens the claim simultaneously bars it. And that means that for most local takings claimants, *Williamson County* has closed the federal courthouse doors altogether. *Id.* at 351 (Rehnquist, C.J., concurring in judgment).

That is a serious and unwarranted anomaly. "Plaintiffs alleging violations of other enumerated constitutional rights" by local governments "ordinarily may do so in federal court." *Arrigoni Enters.* v. *Town of Durham*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., dissenting from denial of certiorari). "[T]here is 'no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation.'" *Ibid.* (quoting *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994)).

This Court should therefore make clear that local takings claimants may vindicate their Fifth Amendment rights in a federal forum. The Court could do so in either of two ways. First, it could clarify that, regardless of *Williamson County*'s understanding of Section 1983, an owner who asserts a right to compensation under the Fifth Amendment may bring a state inverse-condemnation action in federal district court under the grant of federal-question jurisdiction in 28 U.S.C. 1331. Second, the Court could revisit *Williamson County*'s unexplained interpretation of Section 1983 and hold that the statute provides a means of enforcing an owner's Fifth Amendment right to just compensation even in the absence of a constitutional violation.

A. *Williamson County* Does Not Prevent Local Takings Claimants From Seeking Just Compensation In Federal Court Under Their State-Law Causes Of Action

Properly understood, *Williamson County* rests on the scope of the cause of action afforded by Section 1983. It thus does not apply when an owner invokes a different cause of action to vindicate her Fifth Amendment rights. And if *Williamson County* prevents an owner from bringing a Section 1983 suit, it is *because* she has such an alternative cause of action available: an inverse-condemnation action or another "adequate [state-law] procedure for seeking just compensation." 473 U.S. at 195. That cause of action is created by state law. But a state inverse-condemnation action asserting an owner's Fifth Amendment rights "aris[es] under" federal law within the meaning of 28 U.S.C. 1331.

1. Williamson County *rested on an understanding of the cause of action in Section 1983*

This Court's opinion in *Williamson County* stated that the claim at issue there was "premature" and "not yet ripe." 473 U.S. at 194, 197. Understandably, therefore, the *Williamson County* rule is often described as a matter of "ripeness." *E.g.*, *Horne* v. *Department of Agric.*, 569 U.S. 513, 526 (2013) (citation omitted). But traditional ripeness principles do not support the rule. Instead, *Williamson County*'s logic indicates—and the Court has since confirmed—that it rests on an understanding of the cause of action in Section 1983.

a. Ripeness doctrine is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *National Park Hospitality Ass'n* v. *Department of the Interior*,

538 U.S. 803, 808 (2003) (citation omitted). The *Williamson County* rule should not be understood as a matter of either constitutional or prudential ripeness.

As to the Constitution, this Court has correctly recognized that an Article III "'Case' or 'Controversy' exists once the government has taken private property without paying for it." *Horne*, 569 U.S. at 526 n.6. The *Williamson County* rule thus "does not affect the jurisdiction of the federal court[s]." *Ibid.*

As to prudential concerns, this Court has stated that prudential ripeness turns on "whether the factual record [i]s sufficiently developed" for review and "whether hardship to the parties would result if judicial review is denied." *Susan B. Anthony List* v. *Driehaus*, 134 S. Ct. 2334, 2347 (2014). But *Williamson County* did not analyze those traditional considerations, and they do not support the *Williamson County* rule. The mere availability of a state-court remedy does not undermine either the fitness of a constitutional claim for judicial review or the hardship to the plaintiff if review is denied. Cf. *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990) ("A plaintiff * * * may invoke [Section] 1983 regardless of any state-tort remedy that might be available.").

b. Rather than ripeness, *Williamson County* rested on the Court's assumption that a Section 1983 action is not available unless the plaintiff has suffered a constitutional violation. That is why the Court began with the premise that the government has not violated the Takings Clause if it has provided "reasonable, certain and adequate provision for obtaining compensation." *Williamson County*, 473 U.S. at 194 (citations omitted). It is also why the Court stated that a property owner who has access to such an adequate mechanism "cannot claim a violation" of the Takings Clause. *Id.* at 195. And

it is why the Court stated that the fact that "*no constitutional violation occurs* until just compensation has been denied" means that an owner must "utilize procedures for obtaining compensation before bringing a [Section] 1983 action." *Id.* at 194 n.13 (emphasis added).

This Court confirmed that understanding in *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). There, the Court recognized that a California landowner alleging a regulatory taking by a city "was entitled to proceed in federal court under [Section] 1983" notwithstanding *Williamson County* because (at the time) "California did not provide a compensatory remedy for temporary regulatory takings." *Id.* at 710. The Court explained that "[h]ad the city paid for the property or had an adequate postdeprivation remedy been available, [the landowner] would have suffered no constitutional injury from the taking alone." *Ibid.* The Court therefore stated that the landowner's "statutory action" under Section 1983 "did not accrue until it was denied just compensation." *Ibid.* And the Court then explicitly formulated the *Williamson County* rule as providing that "[a] federal court * * * cannot entertain a takings claim under [Section] 1983 unless or until the complaining landowner has been denied an adequate postdeprivation remedy." *Id.* at 721. *City of Monterey* thus confirms that *Williamson County* is not about ripeness, "but rather * * * whether the claim is cognizable under [Section] 1983 at all." *Heck* v. *Humphrey*, 512 U.S. 477, 483 (1994).

2. Owners asserting a Fifth Amendment right to compensation may bring their state inverse-condemnation actions in federal court under Section 1331

Even if an owner's Section 1983 suit is barred by *Williamson County*, she may vindicate her Fifth Amendment rights by bringing her state inverse-condemnation action in federal district court under Section 1331.

a. "The phrase 'inverse condemnation' generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a 'taking' of his property under the Fifth Amendment, even though formal condemnation proceedings * * * have not been instituted." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (*San Diego*) (Brennan, J., dissenting) (citation omitted); see *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). If the court finds that a taking has occurred, the result is an award of just compensation and a transfer of the relevant property interest to the government, which "becomes henceforth the full owner." *United States* v. *Lynah*, 188 U.S. 445, 471 (1903). Like a formal condemnation proceeding, therefore, a successful inverse-condemnation action results in a lawful exchange in which the government acquires property for public use and the landowner receives just compensation. See *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 5-6 (1984); *United States* v. *Dow*, 357 U.S. 17, 21 (1958).

Like most other States, Pennsylvania has recognized an inverse-condemnation cause of action. Under the Pennsylvania Eminent Domain Code, 26 Pa. Cons. Stat. Ann. §§ 101 *et seq.* (West 2009), a property owner who believes that her property has been taken may file an inverse-condemnation petition. *Id.* § 502(c). A property owner may invoke the inverse-condemnation procedure

"to recover compensation if there has been a taking of land [under] the Fifth Amendment of the United States Constitution or Article 1, § 10 of the Pennsylvania Constitution." *Commonwealth* v. *Rogers*, 634 A.2d 245, 254 n.5 (Pa. Super. Ct. 1993).

If a property owner brings an inverse-condemnation action, the court must "determine whether a condemnation has occurred." 26 Pa. Cons. Stat. Ann. § 502(c)(2) (West. 2009). If the court finds a taking and awards compensation, it must "enter an order specifying any property interest which has been condemned and the date of the condemnation." *Id.* § 502(c)(3). The governmental defendant then files the order "in the office of the recorder of deeds for the county in which the property is located." *Id.* § 502(c)(4).

b. Under 28 U.S.C. 1331, the federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." That provision is most often invoked "by plaintiffs pleading a cause of action created by federal law." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (*Grable*). But this Court has "recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Ibid.* That longstanding construction "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers." *Ibid.*

This Court has indicated that a state cause of action may be brought under Section 1331 if "a federal issue

is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn* v. *Minton*, 568 U.S. 251, 258 (2013) (citing *Grable*, 545 U.S. at 314). A state inverse-condemnation action based on the Fifth Amendment will ordinarily satisfy those requirements.

First, such a claim necessarily raises a federal question because it rests on the assertion that the property owner has been subjected to "a 'taking' of his property under the Fifth Amendment." *San Diego*, 450 U.S. at 638 n.2 (Brennan, J., dissenting).

Second, in the typical inverse-condemnation case, the governmental defendant denies the owner's contentions about the existence or extent of the asserted Fifth Amendment taking. "This is just the sort of 'dispute respecting the effect of federal law' that *Grable* envisioned." *Gunn*, 568 U.S. at 259 (brackets, citations, and ellipses omitted).

Third, disputed questions under the Takings Clause qualify as "substantial in the relevant sense." *Gunn*, 568 U.S. at 260. The Court has previously recognized that similar questions of federal constitutional law, including takings claims, are of sufficient importance to justify the exercise of federal jurisdiction. See, *e.g.*, *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156, 164 (1997); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 201 (1921). And the proposition that takings claims should not be disfavored among constitutional claims with respect to access to federal court, see, *e.g.*, *Arrigoni*, 136 S. Ct. at 1410-1411 (Thomas, J., dissenting from denial of certiorari), furnishes particular reason for regarding such claims as presenting "substantial" federal questions.

Finally, while allowing state inverse-condemnation actions to be brought in federal court might "materially affect * * * the normal currents of litigation," *Grable*, 545 U.S. at 319, it would not *upset* "the appropriate 'balance of federal and state judicial responsibilities,'" *Gunn*, 568 U.S. at 264 (quoting *Grable*, 545 U.S. at 314). Instead, it would *restore* that balance by ensuring that takings claimants, like other plaintiffs with constitutional claims against local governments, can vindicate their federal rights in a federal forum.

c. This Court's decision in *International College* confirms that state inverse-condemnation actions relying on the Fifth Amendment may be brought in federal court under Section 1331. In that case, a property owner filed state-court actions seeking review of decisions by the Chicago Landmarks Commission under the Illinois Administrative Review Law. 522 U.S. at 159-160. Among other things, the owner alleged that Chicago's landmark ordinances "effect[ed] a taking of property without just compensation under the Fifth and Fourteenth Amendments." *Id.* at 160. The Commission removed the case to federal district court. *Id.* at 161.

This Court held that the case was properly removed because it "could have been filed in federal court" under Section 1331. *International College*, 522 U.S. at 163. Invoking the precedents later synthesized in *Grable* and *Gunn*, the Court explained that "even though state law creates a party's cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishe[s] that its right to relief under state law requires resolution of a substantial question of federal law." *Id.* at 164 (brackets omitted). And the Court concluded that the owner's "federal constitutional claims"—including its takings claims—

"unquestionably fit within this rule." *Ibid.* The same analysis applies to a state inverse-condemnation action in which the owner asserts a right to just compensation under the Fifth Amendment.[6]

d. If this Court holds that state inverse-condemnation actions may be brought under Section 1331, it will make clear that local takings claimants have a viable path to federal court regardless of the content of state law. If the state provides an adequate inverse-condemnation cause of action for raising Fifth Amendment claims, the owner may bring that action in federal court under Section 1331. If state law does *not* provide an adequate mechanism, then *Williamson County* does not apply even on its own terms and the owner is "entitled to proceed in federal court under [Section] 1983." *City of Monterey*, 526 U.S. at 710.[7] And if there is a question

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[6] State inverse-condemnation actions may involve specialized valuation procedures. See 26 Pa. Cons. Stat. Ann. §§ 502-515 (West 2009). But an established body of law governs the translation of such procedures into federal court, because it has long been settled that formal condemnation proceedings may be removed to federal court (for example, when the parties are diverse). See, *e.g.*, *Boom Co.* v. *Patterson*, 98 U.S. 403, 406-407 (1878); see also Fed. R. Civ. P. 71.1(k).

[7] That situation would exist if, for example, state law "did not provide a compensatory remedy" for the type of taking alleged, *City of Monterey*, 526 U.S. at 710, or if the relevant governmental body were "not subject to inverse condemnation proceedings," *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 n.8 (1997). It would also exist if the state cause of action did not entitle the owner to assert a Fifth Amendment claim, because owners are "not required to resort to piecemeal litigation" to recover just compensation. *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986); see, *e.g.*, *Asociación De Subscripción Conjunta Del Seguro De Responsibilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 16-17 (1st Cir. 2007).

about the adequacy of the state-law mechanism, a property owner may proceed in the alternative, invoking both the state cause of action and Section 1983 in her federal complaint.

Clarifying that the *Williamson County* rule rests on an interpretation of Section 1983 would also resolve the confusion in the lower courts about the rule's purported "jurisdictional" status. See *Arrigoni*, 136 S. Ct. at 1411-1412 (Thomas, J., dissenting from denial of certiorari). And it would eliminate the uncertainty about whether the rule applies to actions originally filed in state court and the associated opportunities for "gamesmanship" if such actions are removed to federal court. *Id.* at 1411; see Pet. Br. 30-33. Because *Williamson County* is an interpretation of Section 1983, it applies to all Section 1983 suits asserting just-compensation claims, whether they are brought in federal or state court. But for the same reason, it does *not* apply to other suits.

e. Here, it appears to be undisputed that petitioner has an inverse-condemnation cause of action under Pennsylvania law that would allow her to assert her Fifth Amendment claim. Pet. App. A5, A21. Thus far, the case has been litigated on the assumption that she could not bring that cause of action in federal district court. If this Court rejects that assumption, it should vacate the judgment below and remand to allow petitioner to amend her complaint to invoke her Pennsylvania inverse-condemnation cause of action.[8]

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[8] The fact that the Takings Clause provides a right to compensation does not resolve the question whether it also creates a cause of action to recover that compensation that can be pressed in federal court. Cf. *Alexander* v. *Sandoval*, 532 U.S. 275, 286-287 (2001). In *First English Evangelical Lutheran Church of Glendale* v. *County of Los An-*

B. This Court Also Could Revisit And Reject *Williamson County*'s Understanding Of Section 1983

This Court granted review to decide whether to "reconsider" the *Williamson County* rule. Pet. i. The Court ordinarily requires a special justification before revisiting one of its precedents. As several Members of the Court have already recognized, however, the confusion and anomalies spawned by the *Williamson County* rule furnish ample justification for reconsidering it. And *Williamson County*'s unexplained assumption about the scope of Section 1983 was incorrect.

1. There are special justifications for reconsidering Williamson County*'s understanding of Section 1983*

This Court ordinarily requires some "special justification" before reconsidering one of its decisions. *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (citation omitted). The Court has also recognized that "*stare decisis* has special force in respect to statutory interpretation." *Id.* at 2411 (citations and internal quotation marks omitted). But even in the statutory context, *stare decisis* is not "an inexorable command." *Hohn* v. *United States*, 524 U.S. 236, 251 (1998) (citation omitted). And here, several factors provide the requisite special justification for reconsidering *Williamson County*'s understanding of Section 1983.

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geles, 482 U.S. 304 (1987), this Court held that California had erroneously denied compensation for a particular type of taking under its inverse-condemnation cause of action. *Id.* at 314-318. Here, in contrast, Pennsylvania has provided a statutory cause of action that allows owners to recover the full measure of compensation required by the Fifth Amendment, and owners who wish to do so may bring that cause of action in federal court under Section 1331.

First, the *Williamson County* rule—at least as understood by the lower courts—has "downgraded the protection afforded by the Takings Clause to second-class status" by effectively excluding an entire class of takings claimants from federal court. *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). That is a "real anomal[y], justifying [the Court's] revisiting the issue." *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment). And that is particularly true because *Williamson County* itself did not appear to recognize that it would have that effect. See pp. 2-3, *supra*.

Second, the *Williamson County* rule has spawned "confusion in the lower courts." *Arrigoni*, 136 S. Ct. at 1411 (Thomas, J., dissenting from denial of certiorari). Among other things, the courts of appeals have reached different conclusions about whether the rule is jurisdictional and whether it should apply to claims removed from state court. *Id.* at 1411-1412. The fact that a precedent has proved to be "a positive detriment to coherence and consistency in the law" is a "traditional justification for overruling [it]." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989).

Third, "the affirmative case" for *Williamson County*'s understanding of Section 1983 "has yet to be made"—and certainly was not made in *Williamson County* itself. *San Remo*, 545 U.S. at 351 (Rehnquist, C.J., concurring in judgment). As we have explained, *Williamson County* began with an understanding of the Fifth Amendment that was correct and grounded in nearly a century of precedent. See Part I.A, *supra*. But the Court then simply assumed that a property owner lacks a cause of action under Section 1983 unless the local government has *violated* the Fifth Amendment. See

Part II.A.1, *supra*. The Court did not explain the basis for that assumption, much less attempt to ground it in Section 1983's text or history.[9]

2. Williamson County's understanding of Section 1983 is incorrect

Because there is ample justification for revisiting the issue, this Court could ensure a federal forum for local takings claimants by considering afresh whether Section 1983 provides a cause of action to an owner who has not yet received just compensation for a taking by a local government, but who has available an adequate state-law mechanism for obtaining compensation. Section 1983's text and history—in combination with the unique nature of the Takings Clause—indicate that it does.

a. Section 1983 provides a cause of action to a party who is "subjected * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a person acting under color of state law. Most constitutional rights confer a right to be free from a type of *unlawful* government conduct—for example, unreasonable searches and seizures. In that typical context, an individual is "depriv[ed] of [a] right[]" secured by the Constitution within the meaning of Section 1983 only if a state actor has acted *illegally* by violating the relevant constitutional provision. This Court has thus often stated that Section 1983 actions "sound in tort,"

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[9] Petitioner errs in contending (Br. 48) that *stare decisis* has less force here because the *Williamson County* rule is "constitutional" or "procedural." As explained, the rule is not constitutional—it does not, for example, preclude Congress from allowing just compensation claims to be brought in federal court. Nor does it govern the procedure by which cases are adjudicated. Instead, it rests on an understanding of Section 1983's scope. See Part II.A.1, *supra*.

City of Monterey, 526 U.S. at 709, or provide a remedy for constitutional "violations," *Howlett* v. *Rose*, 496 U.S. 356, 358 (1990). When the government violates the Takings Clause—by, for example, taking property without providing any mechanism for obtaining compensation—Section 1983 functions just as it ordinarily does: as a remedy for wrongful conduct that violated the Constitution. See *City of Monterey*, 526 U.S. at 710.

Unlike most constitutional provisions, however, the Takings Clause does not merely guarantee a right to be free from specified *unlawful* government action. It also confers a right "to secure *compensation*" for *lawful* takings. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 315 (1987). And although the government is not required to pay the compensation at the time of the taking, the owner's Fifth Amendment right to compensation vests immediately. *Id.* at 317-320. Indeed, the very definition of a constitutionally sufficient post-taking mechanism is that it provides the owner with a "reasonable, certain and adequate provision" for vindicating that Fifth Amendment right. *Cherokee Nation*, 135 U.S. at 659; see Part I.A, *supra*.

Accordingly, an owner whose property is taken but who has not yet received the constitutionally required compensation can be understood to have been "depriv[ed] of [a] right[] * * * secured by the Constitution." 42 U.S.C. 1983. And that remains true even if the taking did not violate the Fifth Amendment because the owner has been provided with an adequate mechanism for obtaining compensation. In the unique context of the Takings Clause, Section 1983 is not limited to redressing or

preventing constitutional *violations*—instead, it also affords an owner an alternative means of *enforcing* her constitutional right to just compensation.

b. That understanding is supported by Section 1983's historical context and practical operation. Section 1983 was originally enacted in 1871, during Reconstruction. *Patsy* v. *Board of Regents*, 457 U.S. 496, 502-503 (1982). Congress intended the statute to "assign[] to the federal courts a paramount role in protecting constitutional rights." *Id.* at 503. As this Court has repeatedly recognized, Congress took that step in substantial part because it "believed that federal courts would be less susceptible to local prejudice and to the existing defects in the factfinding processes of state courts." *Id.* at 506. Section 1983 was, in other words, "an attempt to remedy the state courts' failure to secure federal rights." *Mitchum* v. *Foster*, 407 U.S. 225, 241 (1972).

Partly for this reason, Section 1983 does not generally require exhaustion of state remedies as a prerequisite to suit. *Patsy*, 457 U.S. at 507. Instead, Congress understood that it would "provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." *Id.* at 506. Section 1983 should not be construed to require a different result for owners seeking to enforce their Fifth Amendment right to just compensation. They too are entitled to the federal forum that Congress intended to provide for federal constitutional claims against state actors.

c. If this Court agrees that Section 1983 allows an owner to bring an action against a local government to recover compensation for a taking even when an adequate state-law mechanism is available, it should make clear that its holding does not mean that the individual

officials responsible for such a lawful taking are potentially subject to personal liability. The Court has often recognized that Section 1983 requires it to craft "the elements of, and rules associated with, an action seeking damages" for a deprivation of constitutional rights. *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 920 (2017). And the Court has also observed that those rules "should be tailored to the interests protected by the particular right in question." *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978).

Where the "deprivation" giving rise to a Section 1983 action is the fact that the property owner has not yet received compensation for a lawful taking by a local government, she is only entitled to recover compensation from the government that owes it. She has no right to recover from individual officials, because they do not owe compensation for property lawfully taken by the government. It would thus be inappropriate to interpret Section 1983 to impose personal financial liability on those officials. Cf. *Lewis* v. *Clarke*, 137 S. Ct. 1285, 1292 (2017) (explaining that suits against governmental officials in which "[t]he real party in interest is the government" are "only nominally against the official and in fact against the official's office and thus the [government] itself"); *Hartman* v. *Moore*, 547 U.S. 250, 261-265 (2006) (limiting liability against certain officers where injury ultimately resulted from actions of other officers). The officials responsible for a lawful taking therefore should not be regarded as "person[s]" who have "subject[ed], or caused to be subjected," the property

owner to the deprivation of her Fifth Amendment rights within the meaning of Section 1983.[10]

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JEFFREY H. WOOD
CHAD A. READLER
Acting Assistant Attorneys General
JEFFREY B. WALL
Principal Deputy Solicitor General
ERIC GRANT
HASHIM M. MOOPPAN
Deputy Assistant Attorneys General
BRIAN H. FLETCHER
Assistant to the Solicitor General
WILLIAM B. LAZARUS
BRIAN C. TOTH
Attorneys

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[10] For similar reasons, a lawful taking would not give rise to a violation of 18 U.S.C. 242, a criminal statute that uses language paralleling Section 1983 to make it a misdemeanor to "willfully" subject a person to a deprivation of constitutional rights.

APPENDIX

1. U.S. Const. Amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. 18 U.S.C. 242 provides:

Deprivation of rights under color of law

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death

results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

3. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

4. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

5. 26 Pa. Cons. Stat. Ann. § 502 (West 2009) provides:

Petition for appointment of viewers

(a) Contents of petition.—A condemnor, condemnee or displaced person may file a petition requesting the appointment of viewers, setting forth:

(1) A caption designating the condemnee or displaced person as the plaintiff and the condemnor as the defendant.

(2) The date of the filing of the declaration of taking and whether any preliminary objections have been filed and remain undisposed of.

(3) In the case of a petition of a condemnee or displaced person, the name of the condemnor.

(4) The names and addresses of all condemnees, displaced persons and mortgagees known to the petitioner to have an interest in the property acquired and the nature of their interest.

(5) A brief description of the property acquired.

(6) A request for the appointment of viewers to ascertain just compensation.

(b) Property included in condemnor's petition.—The condemnor may include in its petition any or all of the property included in the declaration of taking.

(c) Condemnation where no declaration of taking has been filed.—

(1) An owner of a property interest who asserts that the owner's property interest has been condemned without the filing of a declaration of taking may file a petition for the appointment of viewers

substantially in the form provided for in subsection (a) setting forth the factual basis of the petition.

(2) The court shall determine whether a condemnation has occurred, and, if the court determines that a condemnation has occurred, the court shall determine the condemnation date and the extent and nature of any property interest condemned.

(3) The court shall enter an order specifying any property interest which has been condemned and the date of the condemnation.

(4) A copy of the order and any modification shall be filed by the condemnor in the office of the recorder of deeds of the county in which the property is located and shall be indexed in the deed indices showing the condemnee as grantor and the condemnor as grantee.

(d) **Separate proceedings.**—The court, in furtherance of convenience or to avoid prejudice, may, on its own motion or on motion of any party, order separate viewers' proceedings or trial when more than one property has been included in the petition.